

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 808 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and  
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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NATHUBHA MANUBHA JADEJA

Versus

STATE OF GUJARAT

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Appearance:

MR BJ JADEJA for Petitioners

MR. Y.F. MEHTA, ADDL. PUBLIC PROSECUTOR for Respondent

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CORAM : MR.JUSTICE N.J.PANDYA and  
MR.JUSTICE H.L.GOKHALE

Date of decision: 10/12/96

ORAL JUDGEMENT (per N.J. PANDYA, J)

1. All the three accused -appellants were tried for offences under Section 302 read with Section 34, under Section 326 read with Section 34, under Section 324, under Section 504 read with Section 34, all of I.P.C. by the learned Additional Sessions Judge, Kutch-Bhuj in

Sessions Case No. 62 of 1987. The incident leading to the said trial happened on 2.9.1987 at village Chobari near S.T. Stand of that village at about 4.30 p.m. Just prior to the incident on that very day at about noon time the complainant was threatened by accused No. 3. The threat was to the effect that they are to beat today the moment Diluba comes out.

2. Dilubha, the complainant reported this fact to his father the deceased Khengarji Ratubha and they decided to lodge a complaint about the threat and therefore they had come to the bus-stand of the village for going Bhachau Taluka Head Quarters. The bus had not come and they were waiting when all the three accused came at the place. Accused No. 1 had dharia. Accused No. 2 had stick and accused No. 3 had sword. They started hurling abuses on the deceased and the complainant and after coming near to them a stick blow was given to the deceased by accused No. 2 and accused No. 3 wielded sword on the deceased. At that time accused No. 1 attacked the complainant.

3. In the process the deceased fell down and later on succumbed to his injuries. The complainant when finding the situation to be too tough started running and he was chased by accused Nos. 1 and 2 but he could manage to escape. When he returned the spot he saw that his father was lying there in pool of blood. He was dead.

4. At the time of incident, over and above the complainant, near that place there were other people sitting and of them Abdul Bhachu Hajam, Siddik Amad and Piru Hajam are of importance because one of them Abdul Hajam tried to intervene and he was given a sword blow by the accused No. 3 and as a result he lost his left arm from wrist down.

5. The learned trial judge framed the charge at Exh. 1 and conducted the trial. Thereafter, by judgement dated 9.8.1988 all the accused came to be convicted for offences under Section 302, 326, 324 as well as 504. Recourse has been taken to Section 34 of the I.P.C.

6. So far as hurling of abuses is concerned, we failed to understand how there is a sharing of common intention. It would be an act of independent persons.

7. The important question is sharing of common intention in the instant case. Eye witness in form of P.W. 1 at Exh. 14, the complainant followed by other

eye witnesses clearly indicate that sword blow has been given by accused No. 3 and this is also corroborated by medical evidence of Dr. Acharya, PW 8 at Exh. 25. He has performed post mortem examination and that has been produced on record at Exh. 27.

8. The dead body was found having 5 external injuries. One of which contusion lacerated wound just below the right eye and the other 3 injuries were on the head and the last one was on the left ear. These were incise wounds and had width of 1 cm and had varying length.

9. Of these 5 injuries, injuries 2,3 and 4 had resulted into internal injury of fracture, damage to brain and cerebral haemorrhage. The death is attributed to this. Injuries caused by sharp cutting instruments are injuries 2, 3 and 4 and in the opinion of the doctor which could have been caused either by sword or by dharia.

10. Now so far as involvement in dharia wielding of accused No. 1 is concerned, there is no eye witness against that he had given any blow to the deceased. This leaves only accused No. 3 who was carrying sword and there is evidence to the effect that he had made free use of it. Abdul Hajam's confirming of the attack corroborates the story.

11. Under these circumstances so far as the guilt of the accused No. 3 is concerned there can hardly be any dispute. After initially arguing the matter the learned Advocate Shri Jadeja appearing for the appellants-accused had given up that attempt so far as the accused-appellant No. 3 is concerned. Thereafter, he developed the arguments as to about the remaining two accused can be roped in for the act of accused No.3, namely that of the murder unless there is satisfying evidence as to the sharing of common intention between accused No. 3 on one hand and accused No. 1 and 2 on the other hand. So far as the act of 3 accused is collectively taken it is obvious that they were bewildering the prosecution witnesses including the deceased. If at all any idea was to Khengarji or any one of the prosecution witnesses it is difficult to gather from any of the material on record. The death has occurred with the result of the action of the accused No. 3. However, merely because it has occurred and it has been the result of the act of one of the 3 accused automatically it would not mean that there was a common intention shared by all.

12. If the intention was to cause injury and any one of them goes beyond it and causes death, the remaining companion of the accused cause death cannot, in our opinion, be held responsible for that act of the companion and in absence of any proof as to the common intention and the sharing thereof with regard to causing death of Khengarji is concerned, it will not be possible to sustain the conviction for sentence under Section 302 read with Section 34 of the I.P.C. So far as the remaining part of the judgement as to the conviction of the accused under Section 326 and 324 of I.P.C. is concerned, no doubt, there is sufficient material as to the common intention and sharing thereof. However, section 324 seems to have been invoked by the learned trial judge independent of Section 34 and this would mean that each of the accused was responsible for that offence. By very nature accused No. 2 could not be responsible for an offence under Section 324 because the weapon attributed to him was a stick and it cannot be said to be a sharp cutting instrument. Be that as it may in respect of these two offences R.I. for 3 years has been awarded with fine of Rs. 500/- and R.I. for 7 days and R.I. for one year respectively. R.I. for 7 days has been awarded for offence under Section 504, R.I. for one year has been awarded for offence under Section 324. As on the date these sentences have been exhausted because of the substantive sentences were ordered to be run concurrently.

The net result therefore is that the appeal is accepted so far as the first two accused-appellants are concerned in relation to the conviction under Section 302 read with Section 34 of I.P.C. The rest of the order of the trial court is confirmed. The conviction of accused appellants Nos.1 and 2, namely Natubha Maubha Jadeja and Hatubha Manubha Jadeja for offence under Section 302 read with Section 34 is set aside. They are ordered to be set at liberty forthwith if not required in any other case. Fine if paid is ordered to be refunded.

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